

Washington 25

B-58541

June 27, 1946

The Honorable,

The Secretary of War.

My dear Mr. Secretary:

There has been considered your undated letter received in this office on June 13, 1946, as follows:

"Because of Revised Statute 1222 (10 U.S.C. 756) which prohibits an Army officer on the active list from accepting a civil office and provides that on so doing his commission shall be vacated, the question of whether a Regular Army officer on the active list may accept the commissionership for the United States on the United Nations War Crimes Commission now sitting in London, is referred to you for an opinion. The question of pay and allowances is necessarily involved.

"The United Nations War Crimes Commission is composed of representatives from seventeen United Nations. Some of these representatives are civilians, whereas others are military personnel. The United States representative, who resigned recently, was Colonel Joseph V. Hodgson, JAGD, who is now being separated from active duty in the Army. The functions of the Commission have been described as follows:

"The Commission is primarily a fact-finding body, but it has also advisory functions.

"Its terms of reference were strictly defined in the Lord Chancellor's statement of October 7, 1942. Its purpose, he said, is to investigate war crimes committed against nationals of the United Nations, recording the testimony available, and to report from time to time to the Governments of those nations cases in which such crimes appear to have been committed, naming and identifying wherever possible the persons responsible.

"After its creation, the Commission was entrusted with advisory functions, namely to make recommendations to the Governments on the methods to be adopted to ensure the surrender or capture of the persons wanted for trial as war criminals and on the tribunals by which they should be tried." (United Nations War Crimes Commission, 'The Bathurst Report', American Journal of International Law, July, 1945)

"It is assumed that the officer selected will be appointed as commissioner by the President as Commander in Chief, and will assume his post pursuant to Army orders, attaching him, like his predecessor, to the staff of the Military Attache where he will receive his Army pay and allowances. * * *

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"The question now presented did not arise in the case of the retiring commissioner, Colonel Joseph V. Hodgson, JAGD, because he was not a member of the Regular Army."

The matter was discussed in a memorandum dated May 20, 1946, prepared in the Office of the Judge Advocate General of the Army, in part as follows:

"Construing section 1222 of the Revised Statutes, supra, and the expression 'civil office' contained therein, this office pointed out that the prohibition in the matter of Army officers holding civil office was part of the act of 15 July 1870 (16 Stat. 319), which accomplished a general reduction in the strength of the military establishment after the increase of January 28, 1866. Opinion was expressed that the prohibition obviously applied to civil office within the territorial and legislative jurisdiction of the United States and of Congress, and has no application to the performance of civil duties by officers of the Army in occupied territory, for the reason that military occupation is an incident of command and so comes within the plenary and exclusive jurisdiction of the President as commander in chief, and under ordinary circumstances had application to foreign territory-i.e., to territory which had not yet been incorporated into that of the United States (C.5771, 2 Feb 1899: 20396, 17 Apr 1908). Thus, it was concluded that assignments of officers of the Army to be collectors of customs in Cuba and Porto Rico, when under military occupation, were assignments to military duty and not to civil offices within the meaning of section 1222. Accordingly, it was further held that officers so assigned might not receive additional compensation for the execution of such duty (C.5771, 2 Feb 1899; Dig. Op. JAG, 1912, p. 812, 813).

"On the question whether an officer of the Army could, without vacating his commission (R.S. 1222 and 1860), hold a civil office in the Philippines, it was held that in those sections of the Philippines which were still under the jurisdiction of the Philippine Commission, in contradistinction to the remainder, which was under the joint jurisdiction of the commission and the Philippine Assembly, an officer of the Army could hold civil office, as the commission was but a continuation of the government of military occupation; and under the latter officers who hold civil office are doing military duty (C. 25629, 30 Sep 1909; Dig. Op. JAG, 1912, p. 810).

"4. It would seem that the Commissioner for the United States on the United Nations War Crimes Commission is concerned only with matters arising out of the recent military operations. The commission investigates and advises on reports of violations of the laws of war committed against United Nations personnel. It assists in recording available testimony, makes reports to interested governments on cases in which crimes appear to have been committed; and, where possible, forwards

the names of persons responsible. The commission also makes recommendations in an advisory capacity as to the apprehension and trial of accused persons. All of these activities are seen to be directly related to war activities and in furtherance of announced war aims of the United Nations.

"Accordingly, it can hardly be said that the Commissioner for the United States on the United Nations War Crimes Commission exercises the functions of a civil office. He deals only with the peculiar crimes arising out of the recent hostilities. The accused will in every case be an enemy national. Trials will be held before military commissions, with military judges and under military law. Any sentences which may be imposed will be carried out by military authority.

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"On the basis of the foregoing discussion, it is concluded that the position of Commissioner for the United States on the United Nations War Crimes Commission is not a civil office within the meaning of section 1222 of the Revised Statutes, supra, and that appointment to that position of an officer of the United States Army on the Active list will not operate to vacate his commission in the Regular Army."

Section 1222, Revised Statutes, referred to in your letter, provides:

"No officer of the Army on the active list shall hold any civil office, whether by election or appointment, and every such officer who accepts or exercises the functions of a civil office shall thereby cease to be an officer of the Army, and his commission shall thereby be vacated."

Provision for expenses for participation by the United States in the United Nations War Crimes Commission was first made in the Department of State Appropriation Act, 1946, under the heading "United Nations Commission for the Investigation of War Crimes" as follows (59 Stat. 180):

"For all necessary expenses of the participation by the United States in the United Nations Commission for the Investigation of War Crimes, including personal services without regard to civil-service and classification laws; travel expenses without regard to the Standardized Government Travel Regulations and the Subsistence Expense Act of 1926, as amended; representation allowances in accordance with the Act of May 24, 1924 (22 U.S.C. 12); stenographic reporting and other services by contract, books of reference and periodicals, and the rent of office space, without regard to section 3709 of the Revised

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Statutes; printing and binding; and the share of the United States in the expenses of the secretariat of the Commission \$60,000." (Under-scoring supplied.)

At the hearings before a subcommittee of the Committee on Appropriations, House of Representatives, 79th Congress, First Session, on the Department of State Appropriation bill for 1946, H.R. 2603, it was stated with respect to the foregoing provision (see report of the hearings, page 78 et seq.)

"Mr. Hackworth. It is proposed to go on with the work of the War Crimes Commission in which we have been participating. That Commission, as you may know, was established in October 1943, and we used, out of the President's emergency fund, the necessary funds for carrying on the work up to the end of December 1944. By reason of the fact that Congress had passed an act prohibiting the use of the emergency fund for such an organization, we came to the Congress last December and asked for funds to carry us over to the end of the fiscal year 1945.

"Mr. Rabaut. You came to the Deficiency Committee.

"Mr. Hackworth. Yes. That appropriation failed, and as a result we have not been able to send our man to London, and we are now asking for funds to enable us to go on with this work the next fiscal year, 1946.

"DUTIES OF THE COMMISSION

"Mr. Rabaut. Tell us roughly what the work of the Commission consists of.

"Mr. Hackworth. The Commission was established to investigate war crimes, after statements made by the President, the Secretary of State, and various foreign governments concerning the necessity of punishing war criminals. After the Commission was under way for a short time it was given the additional duty of making recommendations to the governments with respect to procedural matters, and at the present time those are the functions of the Commission; namely, to investigate war crimes cases and to make recommendations with respect to methods of procedure in handling the cases. Briefly, that is about the situation as it stands today.

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"Mr. Rabaut. Is the War Crimes Commission meeting now?

"Mr. Hackworth. It is.

"Mr. Rabaut. Have you got a representative on it?

"Mr. Hackworth. We have. Lieutenant Colonel Hodgson, a War Department man, is on the Commission.

"Mr. Rabaut. How many members would you have on the Commission?

"Mr. Hackworth. Before the appropriation failed we had a Commissioner and a Deputy Commissioner: Colonel Hodgson was the Deputy Commissioner. He is carrying on.

"Mr. Rabaut. Who was the Commissioner?

"Mr. Hackworth. The Commissioner was Mr. Pell of New York State.

"ALLOCATION OF FUNDS APPROPRIATED

"Mr. Rabaut. How do you propose to spend this \$60,000?

"Mr. Hackworth. It will go to pay the salaries of our representative on the commission and his assistants, rent, heat and light, living allowances, and our contribution to the over-all expenses of the commission, which thus far has been comparatively small. (Underscoring supplied.)

"Mr. Rabaut. That expense of ours, I suppose, is broken down so as to be commensurate with that of Great Britain?

"Mr. Hackworth. Yes; the over-all expense, as I remember now, is prorated on an equal basis. The basic contribution is on an equal basis, 400 pounds a year. Anything in excess is on a prorated basis. Each country contributes an equal amount to the over-all expenses.

"NUMBER OF EMPLOYEES

"Mr. Rabaut. How many employees do you have in the set-up?

"Mr. Hackworth. Our set-up has been very small. We have had Mr. Pell, and provision for an assistant to him, who has not been appointed. There is provision for two people at \$5,600 a year; an administrative assistant and two clerk-stenographers.

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"Mr. Jones. As I understand there is no basic authority for this commission.

"Mr. Hackworth. For this War Crimes Commission?

"Mr. Jones. Yes

"Mr. Hackworth. There is no basic law here that I know of."

Thus, from the said appropriation provision and what was brought out at the hearings, it would appear that while the position of commissioner for the United States on the United Nations War Crimes Commission was not expressly created by statute, it was legislatively recognized as existing under the jurisdiction of the Department of State-- a civil agency of the Government--for an indefinite period, on a civil salary basis, with representation allowances as authorized for civil officers of the Department of State by section 12 of the act of May 24, 1924, 43 Stat. 142, as amended, 22 U.S.C. 12, and that such position originally was filled by a civil representative of the Government. In view of such circumstances, this office would not be warranted in concluding on the present record that such position is not a "civil office" within the meaning and intent of that term as used in section 1222, Revised Statutes, supra. See decision of November 2, 1945, 25 Comp. Gen. 377, and the authorities cited and discussed therein. In that situation, this office would appear necessarily required to question the continued payment of pay and allowances to an officer on the active list of the Regular Army if he should accept or exercise the functions of the commissionership for the United States on the United Nations War Crimes Commission, unless and until it should be judicially determined that he had not thereby vacated his commission in the Army (1 Comp. Gen. 499), or unless the President finds that the utilization of an officer on the active list of the regular Army on this commission will aid in carrying out the purposes set forth in section 1, Title I, of the First War Powers Act of December 18, 1941, 55 Stat. 838.

Respectfully,
(Signed) FRANK L. YATES

Assistant Comptroller General
of the United States.